No. 303

IN THE

Supreme Court of the United States

October Term, 1965

United States of America, *Appellant*

v.

Von's Grocery Company and
Shopping Bag Food Stores, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Brief of the National Association of Retail Grocers of the United States, as Amicus Curiae

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STATEMENT OF INTEREST OF THE ASSOCIATION

The National Association of Retail Grocers of the United States (hereinafter called "the association") respectfully submits this brief as *amicus curiae* because of the concern of its members. Written consent of all parties to file a brief was given under Rule 42(2).

The association is a non-profit membership trade association, founded in 1893, and incorporated in 1916 under the law of the District of Columbia, with its principal office and place of business at 360 North Michigan Avenue, Chicago, Illinois.

It is a federation of over 100 state and local food retailer associations, and has approximately 40,000 members, including supermarket operators.

The Board of Directors of the organization—all of its officers and directors—are local operators. The association represents retail food distributors who conduct small and medium size local enterprises, a substantial and growing percentage of which are corporations subject to Section 7 of the Clayton Act, 15 USC § 18.

While, the appellees have a somewhat larger sales volume than that held by members whose interests prompt our concern, we believe that the Government's legal test to govern mergers between competitors in the highly competitive retail grocery field will impose a new and severe handicap on competitive growth and development of independent supermarket operators.

The interest of the association and its members in this case arises because of its many unique features. It is the first case to come before this Court in which the Government has challenged any merger in retail food distribution. It is the first involving appropriate standards for applying Section 7 to what the Government terms "an industry where large firms are not yet dominant and the opportunities of individual entrepreneurs are substantial", and which has a technology allowing relatively small firms to thrive for the indefinite future (Br. p. 16). It is the first action to reach this Court presenting substantial questions as to the

proper tests under Section 7 applicable to a merger of concerns engaged solely in retail distribution.

The members of the association have an interest in this action because the design of the Government is to condemn the merger under a test of presumptive illegality, by applying a rigid mechanical formula based primarily on market share statistics without determining the probable effect of the merger on competition in the market. This issue is one of primary significance. The association is apprehensive that if the Government's position in this case is approved, it will result in penalizing the growth and success of many local operators in a manner that defeats antitrust policy. It is believed that the proposed construction of Section 7 will erode competitive strength of local retailers.

Finally, the association, now as in the past, supports effective enforcement of Section 7 and other antitrust laws. The best indication of it's good faith and credibility in this matter is referred to in the Government's brief (p. 10) where it calls attention to a study published in 1959 by the association, entitled *The Merger Movement in Retail Food Distribution 1955-1958.* When this study was published, no action had been taken under Section 7 challenging an acquisition in the industry. But now, seven years later, no one could be more surprised that the first case to reach this Court involves a merger of two local, largely family-owned companies, each having approximately 4 per cent of the market where the evidence shows so clearly that no harm to competition will result. Prior to filing this complaint, the association had consistently supported the Department of Justice in antitrust matters both before this Court and Congress. The organization's position in the instant case is believed consistent with its basic policy.

INTRODUCTION AND SUMMARY OF ARGUMENT

Essentially, the Government is seeking to outlaw the merger of Von's and Shopping Bag under a rule of presumptive unlawfulness based on a superstructure of statistics. Its major aim is to escape having to demonstrate the likelihood of substantial adverse competitive effect.

The trouble with this simplified theory is that it does not fit the facts in this case, and accordingly does not carry out the policy of the statute. The unique competitive situation shown in the record precludes use of a static mold which gives no consideration to the market setting.

The market involved is not structurally oligopolistic, and has exhibited no sign of monopolistic behavior. It contains effective antibodies which prevent any prospect of dominance by a few large concerns.

There is no image of bigness serving as a competitive advantage, and no colossus in the industry to support a presumption of illegality. Appellees are local, largely family-owned companies and serve a small part of the relevant market, which is strongly decentralized.

Quantitative measures of the merger in terms of market shares, market rank, market gap and concentration ratios do not support the position that precedential case authority opens the way for imposition of a test based on presumptive illegality. The 7 per cent of the Los Angeles market served by Von's after the merger is small, and will not produce significant concentration, or give Von's a decisive competitive advantage.

The Government's strict mechanical market shares theory for invalidating horizontal grocery mergers strikes indiscriminately at acquisitions having no demonstrable anticompetitive impact, as well as those strengthening competition. The Government's rigid and encompassing test forecloses normal and beneficial avenues for growth. Moreover its excessive reach stretches the application of the law to a point where it could actually produce anticompetitive effects and thereby become self-defeating.

There is no foundation in law or in fact for holding that the merger of Von's and Shopping Bag is unlawful. In view of the market facts in this case and the economic characteristics of the parties and the industry generally, we submit it is inappropriate to prescribe a test which relieves the Government of its burden to establish prohibited competitive effect in the first merger case pertaining to retail grocery distribution. Cf. *White Motor Co.* v. *United States,* 372 U.S. 253 (1963).

I. The validity of the merger at bar should be tested on the basis of its actual and probable competitive effects generally in Los Angeles. The parties involved are small compared to their large market. They operate local businesses in a fragmented market. It is highly competitive, and smaller firms have shown an ability to compete vigorously. "[S]mall chains, and even some single-store enterprises, were able to operate efficiently and to hold their own in competition with the larger chains." Gov. Br. p. 16.

With respect to the industry nationally, the Government acknowledges that it is not one where large firms are dominant. "Furthermore, from all indications, its

technology is such that, even today, and for the indefinite future, many relatively small firms should be able to thrive." Gov. Br. p. 16.

A rule of presumptive unlawfulness has no place in this case. It has been applied where the market is dominated by a few companies, and where the merger will result in a further significant increase in concentration. Case authority authorizing a market shares test of presumptive illegality is inapposite here.

Figures in the record with respect to market shares held by larger firms in Los Angeles and nationally do not demonstrate anticompetitive effect, and the Government has indicated an uncertainty with respect to the degree of concentration in the relevant market it asserts has taken place and relies on to support its theory. The facts in this case discredit the Government's suggestion that the Los Angeles market is on the way to becoming excessively concentrated, and belie the assertion that concentration nationally is on the rise. A nation-wide trend toward supermarkets appears as a major influence reducing the number of grocery stores and increasing the importance of those in operation.

A telescopic view of this merger entails more than looking at the form of the market in terms of structure. It also requires that equal attention be given to its competitive substance.

II. In removing the "acquiring-acquired" test and the term "community" from the 1914 version of the statute, Congress intended that the standard for judging a horizontal merger applicable in this case be based on its competitive effect in the relevant market. Among the factors it considered important was the

frequent desirability of improving the competitive position of local businesses. It was concerned about the danger of prohibiting horizontal mergers under mechanical rules. The 1950 amendments to the statute adopted a more meaningful standard concerned with demonstrable effect on competition. Congress avoided trying to classify harmful horizontal acquisitions on the basis of a few simple facts. It emphasized the primacy of competition, and not the competitive relationship of the merging firms or their share of the market.

III. The Government's simplified test will prejudice the growth of relatively small concerns and defeat the purpose of the statute. It will have adverse effects on local control of markets.

Holding a merger of the small proportions challenged here presumptively illegal because of structural changes in the market clears the way for disapproval of similar acquisitions involving similar market shares. In more narrowly defined markets, the proposed standard would make mergers between competitors of minor significance inherently suspect.

As a practical matter, the proposed rule against horizontal acquisitions will close the most readily available and beneficial merger route for many smaller businesses. Their only alternative will be to build through internal expansion. This creates numerous competitive inequalities. The issue can ultimately become one of being denied adequate opportunities to expand in competition with larger rivals.

Paradoxically, the Government's theory has the capacity to create a special business class deprived

of making acquisitions because they lack sufficient economic power. Applying a simplified market shares test in this case will inhibit competitive conditions Congress sought to promote and encourage those it desired to prevent.

ARGUMENT

I.

THE MERGER SHOULD BE VIEWED FROM ITS EFFECTS ON COMPETITION GENERALLY IN LOS ANGELES, INSTEAD OF MERELY RELYING ON MARKET SHARES OF THE PARTIES AND AGGREGATE SHARES FOR GROUPS OF COMPANIES.

The heart of the Government's theory in this case is that the compilation of statistics on market shares found in the record establishes a presumption that the merger is illegal. To color its position so it may appear more reasonable, the Government seeks to create the image that involved here is the consolidation of great economic power in the hands of a large corporation. With this foundation, it proceeds to dispense itself of the need to demonstrate probable anticompetitive effect, and to disregard substantial evidence in the record demonstrating that the merger will have no harmful result prohibited by the statute. Thus, the Government's primary effort is to shield an unsound case from inquiry regarding market impact, which will expose its weakness.

Part I of our argument will show this is not an action where naked statistical comparisons can be substituted for reliable evidence showing probable anticompetitive impact.

A. The Merger Is Not of Such Size To Be Inherently Suspect Under an Automatic Market Shares Test.

Involved in this action is a horizontal merger of local, largely family-owned companies (Fdgs. 1, 6, R. 3064-3065; Fdg. 12(e), R. 3068; Gov. Br. n. 13, pp. 12-13), holding a small percentage (R. 2787) of a large fragmented market (R. 2156, 3020), in competition with numerous firms of comparable size (R. 2787) and a great many smaller, but extremely vigorous, competitors (R. 1895-1901, 1947-1951). Compared to their large geographic and product market, appellees are relatively small.

The Government relies on previous merger cases before this Court, contending that they point the way toward using a market shares test for holding the merger presumptively illegal. But such reasoning falls of its own weight when this merger is compared to others previously considered by the Court.

Von's was not the market leader before or after the merger (Fdg. 3, R. 3065; Fdg. 50, R. 3080). Von's share of the market after the merger was 7.5 per cent of grocery store sales and 6.9 per cent of food store sales (Fdg. 74, R. 3084-3085), compared to the merged firms' share of 36 per cent in *Philadelphia*,[1] 29 per cent in *Alcoa*,[2] and 25 per cent in *Continental Can*.[3] Furthermore, concentration factors in retail grocery distribution in Los Angeles show a fragmented market quite unlike that in previous merger cases

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[1] *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963).

[2] *United States* v. *Aluminum Company of America*, 377 U.S. 271 (1964).

[3] *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964).

before this Court. In terms of market shares, the two largest concerns in Los Angeles held only 15.5 per cent of grocery store sales and 14.3 per cent of food store sales after the merger (Fdg. 74, R. 3084-3085). Whereas, the top two competitors held 58 per cent in *Philadelphia,* and 52 per cent in both *Alcoa* and *Continental Can.* And, further emphasizing the differences involved, the company in Los Angeles with the largest percentage of the market (Safeway) suffered a market share decrease from 14.2 per cent to 7.7 per cent from 1948 to 1960 (R. 2787). Following the merger, Von's had approximately a 1 per cent greater market share over its nearest smaller competitor (R. 2787). In *Philadelphia,* the comparable figure was 14 per cent, in *Alcoa* it was 6 per cent, and in *Continental Can* 14 per cent.

The Government makes much of the fact that the top 20 retailers held between 54 per cent and 57 per cent of the Los Angeles Market. In *Philadelphia,* five banks held 82 per cent of the market; in *Alcoa* eight firms had 96 per cent of the market, and in *Continental Can* five companies possessed 70 per cent of the market.

With respect to *Brown Shoe,* the acquired firm was "the largest family-style shoe store chain in the United States," *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 303 (1962), whereas Shopping Bag was small in the national market, and held only 4.2 per cent of grocery store sales and 3.8 per cent of food store sales in Los Angeles (R. 2787). It's earnings and profits were declining, and it suffered from a shortage of qualified executive personnel (Fdg. 12, R. 3066-3068).

Brown Shoe was both the fourth largest shoe manufacturer, and the third largest seller of shoes by dollar

volume in the country. Brown was a "moving factor" in a trend among shoe manufacturers to acquire retail outlets. Prior to the merger, it acquired the Nation's largest operator of leased shoe departments. *Brown Shoe, supra* (370 U.S. at 297, 301-303). Von's is certainly not in this class. And, as the Government admits, Von's and Shopping Bag achieved their present size through internal expansion (Gov. Br. p. 4).

The local market share held by both Brown and Kinney was significant primarily because the companies involved had a customer-supplier relationship raising the issue of foreclosure of a share of the market otherwise open to competitors. *Brown Shoe, supra* (370 U.S. at 328-332). "Thus, in this industry, no merger between a manufacturer and an independent retailer could involve a larger potential market foreclosure." *Brown Shoe, supra* (370 U.S. at 331-332). Since the merger of Von's and Shopping Bag is a horizontal arrangement, the foreclosure test is literally inapplicable.[4]

The Government's heavy reliance on market shares in this case is misplaced since the market facts shown in the record demonstrate that Von's will not have a decisive advantage over its competitors (R. 1641-1645; Fdg. 82, R. 3088-3089). The 7 per cent of the market held by Von's, relative to 93 per cent held by remaining competitors, is not such as automatically to supply an affirmative answer to the critical question of whether the merger will have a probable effect prohibited by Section 7. If anything, the market shares factor indicates quite the contrary.

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[4] Kaysen and Turner, Antitrust Policy (1959), 130. See Bock, Mergers and Markets (National Industrial Conference Board, Study No. 85, 1964) 167.

A merger having the small proportions shown here cannot be considered as one producing a firm controlling an "undue" percentage share of the Los Angeles market resulting in significant increased concentration. It is well below the line established in *Philadelphia* and *Continental Can*. And it does not pose a threat under standards recommended by Kaysen and Turner,[5] Bok[6] and Stigler.[7] In fact under Stigler's rules the merger would be *prima facie* lawful.[8]

The share of the Los Angeles market held by Von's resulting from the acquisition of Shopping Bag, is not of such dimensions as to warrant application of the rule of presumptive unlawfulness. The burden is on the Government to prove that the merger will create a reasonable probability of substantial lessening of competition, or a tendency to create a monopoly.

B. In the Context of This Case, the Government's Reliance on Concentration as a Criterion Is Unwarranted and Untenable.

The Government's rationale centers around the word "concentration", which it equates with proof of declining competition proscribed by Section 7. There

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[5] Kaysen and Turner, *supra* at 133.

[6] Bok, Section 7 of the Clayton Act and The Merging of Law and Economics, 74 Harv L Rev 226, 308-316 (1960). According to the Government's brief, in 1948 the aggregate market share held by the 8 largest Los Angeles grocery chains was 33.7 per cent (Br. pp. 9, 33); at the time of the merger in 1960 it states this share was 39 per cent (Br. p. 32). "It is true that if the top four, rather than eight, firms were chosen, the increase would be substantially smaller." (Br. n. 37, p. 37). Bok suggests an increase of 7 or 8 per cent as the *lower* limit of a significant growth in concentration.

[7] Stigler, Mergers and Preventive Antitrust Policy, 104 U of Pa L Rev 176, 181-182 (1955).

[8] *Ibid.*

are three difficulties with this. First, evidence in the record undermines the Government's contention that grocery store sales in Los Angeles have become so concentrated in the hands of a few of the largest concerns as to produce the probability of a substantial lessening of competition. Second, the facts in this case do not show a direct relationship between changes in concentration and the likelihood of substantial competitive harm. Third, it has not been established that to whatever extent concentration has developed or is likely to develop, it is of such character and magnitude to bring about a probable substantial lessening of competition.

Dealing first with what the evidence shows respecting concentration in the relevant market, it appears from the record that there is, at the very least, some uncertainty on this point.

In addition, examination of the record with respect to aggregate shares held by larger firms in the market contradicts the position that increasing concentration has taken place, to the extent that the rule of presumptive unlawfulness is warranted.

Appellees' Exhibit AN (R. 2788) indicates that the percentage of total grocery store sales in the Los Angeles area held by the three largest chains declined from 1952 to 1960. This was also true with respect to the four largest chains, and the five largest chains in the area. The lower court pointed out in its opinion: "In other words, during the period when it is claimed that the competitive situation was deteriorating, single store operators and small chains were beginning, growing, and competing successfully." (R. 3026).

Evidence introduced by the Government also raises substantial doubts that it can successfully predicate its

case on increased concentration (R. 3028). Its Exhibit 7 (R. 2331) shows that the four largest Los Angeles chains accounted for a smaller percentage of grocery store sales between 1948 and 1958. And based on 1958 sales of the 20 largest grocery chains, Government's Exhibit 8 (R. 2332) indicates that the combined concentration ratios for all, except the four largest chains, actually decreased over 10 per cent. The record shows no discernible concentration pattern on which a presumption can be made that the statute has been violated.

The Government's proposed theory is also untenable because it is erroneously based on the assertion that concentration in Los Angeles mirrors national trends. Such reflection is accurate in that neither in Los Angeles nor nationally is there a threat of oligopoly.

The Government has perceived some basic economic facts regarding the industry. Throughout its brief, it has indicated an awareness of its competitive health calling attention that it:

> ". . . is . . . a traditional bastion of the small businessman." (Gov. Br. p. 15)
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> * * *
>
> ". . . remains an industry where large firms are not yet dominant and the opportunities of individual entrepreneurs are substantial. Furthermore, from all indications, its technology is such that, even today, and for the indefinite future, many relatively small firms should be able to thrive." (Gov. Br. p. 16)

With the facts, the Government could not have concluded otherwise than that the industry is highly competitive, that small firms continue to thrive, and that size, however obtained, holds out no guarantee of

success, much less dominance.[9] And these conditions are widely recognized.[10] One of the basic reasons for the healthy competitive state of the industry is the ease with which new firms enter the market and thrive.[11] In part, this has been attributable to the increasing success of voluntary and cooperative wholesale groups which provide small entrepreneurs with many advantages available to larger multi-unit operators. Retail members of these groups comprise the fastest growing segment of the industry. *Economic Inquiry into Food Marketing* (FTC Staff Report), *Part I—Concentration and Integration in Retailing,* p. 6.

That size is not a determinant of ability to compete is vividly demonstrated in Los Angeles where single store operators and small chains were able "to hold their own in competition with the larger chains." (Gov. Br. p. 16).

There is no basis in this record for assuming a parallel between upward adjustments in concentration

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[9] R. 1947-1951.

[10] Such recognition does not always operate to the industry's benefit, as investors may prefer "safer" opportunities. A weekly news magazine recently summarized the industry's prospects, as follows: "Grocery chains—competition remains murderous. Their profit margin of 1.1 per cent is still one of the lowest." *Newsweek,* January 10, 1966, at p. 48.

[11] Other industry factors enhance free access to the market, such as, absence of a patented technology, lack of secret know-how and no substantial product differentiation. A recent Nielsen survey concluded that national-manufacturer branded products have continued to improve their position in the market. See Supermarket News, November 15, 1965, at p. 1. The vigor of competition in food retailing is also strengthened by the entry and growth of new types of competitors. Fdg. 62, R. 3083 For example it has been estimated that 30,000 convenience stores will be in operation by 1975. See, Supermarket News, February 28, 1966 at p. 21. The entry of so-called discount houses with large food departments is also a new competitive factor. Fdg. 61, R. 3082.

ratios with probable substantial lessening of competition (Fdg. 82, R. 3088-3089). The lower court found that the decline in number of grocery stores was due to evolutionary developments inherent in our society (Fdg. 24, R. 3070-3071). The supermarket revolution developed in response to consumer desires and technological changes.[12] It has no antitrust significance. It cannot be assumed that Congress intended Section 7 to obstruct the development of supermarkets.

Where the Government seeks to disparage the intensity of competition, reliance is placed on statistics which fail to support its thesis. For example, it states that between 1948 and 1958 the market share of the 20 largest Los Angeles chains increased from 43.8 per cent to 56.9 per cent.[13] But the bare recital of such figures proves little if anything without further analysis to determine the identity of the component companies. As found by the lower court, "[a]t least seven of the concerns in the top twenty by 1960 were not even in existence as chains (i.e., having more than one store) in 1948." (Fdg. 79, R. 3086-3087). Thus, an attempt is made to prove "concentration" with statistics that are equally susceptible to proof of a competitive market in which smaller operators can achieve success against strong rivals.

The Government places reliance on market share figures for six local markets as evidence of a "rise"

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[12] See, Hampe & Wittenberg, The Lifeline of America (1964), 325-339.

[13] Gov. Br. p. 9 Simultaneously, it attempts to explain away Safeway's decline in market share from 14.2 per cent to 8 per cent by a non-recurring decision to dispose of a large number of small stores. Gov. Br. n. 33, p. 34. The supermarket revolution, however, established a general trend toward operation of fewer stores by larger companies. See, Lebhar, Chain Stores in America 1859 to 1962 (1963) at pp. 339-398.

in concentration in the national market Gov. Br. n. 32, p. 33. They show no such thing. The figures cited were for a particular time only, and the record (R. 1658, 1949) is silent on what time period was selected. These data show no trend of any kind. And since retail grocery distribution is marked by incessant change—always in the process of becoming—, the figures for these local areas lack probative value. Market shares are certainly not static.[13a] There is no basis for assuming they are increasing in the absence of evidence to that effect.

The Government's brief (n. 32, p. 33), states that grocery firms with 11 or more stores increased their share of national sales between 1948 and 1958 from 34.5 per cent to around 43 per cent. But, here again anticompetitive effect is not demonstrated since these data do not consider the changing relationship among the market leaders, who they are, or whether a significant proportion of the market share growth is accounted for by new entrants starting with 1 store and growing into the 11 or more class.[14] In light of the record in this case, reliance on increased concentration by means of such statistics proves nothing.

By centering attention on market share figures, while declining to attach commensurate importance to

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[13a] See, e.g. Supermarket News, December 27, 1965 at p. 1, and February 14, 1966 at p. 1; Food Topics, November, 1965, at pp. 7-26.

[14] A recent study, using a "survivor technique", indicates that there is an inverse correlation between sales growth and size of operators with 4 or more stores. See, Gould, The Relation of Sales Growth to the Size of Multi-Store Food Retailers, (1966). Using another system of analysis, he arrives at the opposite conclusion from that urged by the Government. The logical conclusion may be that, as a general proposition, size alone has no relation whatever to competitive success in retail grocery distribution.

qualitative market facts in the record, the Government is asking that meaningful evidence of competitive impact be treated with indifference. This results in obfuscating analysis and creates a false competitive picture.[15]

Of special significance in this case is that the policy of the law favors "retaining 'local control' over industry". *Brown Shoe, supra* (370 U.S. at 316). "Taken as a whole, the legislative history illuminates congressional concern with protection of *competition,* not *competitors,* and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." *Id.* at 320.

Seizing on the additional share of the market acquired by Von's while giving, at the most, perfunctory attention to the strength of remaining competition, the low entry barriers encouraging unborn competition, and the growth of new forms of competition shown to exist in Los Angeles result in erroneous conclusions.

C. The Proper Antitrust Yardsticks in This Case Require a Probative Analysis of the Market's Competitive Environment.

The structure of the market, as well as the competitive relationship of Von's and Shopping Bag, are relevant factors for consideration. But, against the particular background in this case, whether the merger will result in probable anticompetitive effects prohibited by Section 7 cannot be judged without examination of competitive conditions in the market involved.

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15 "Therefore, the traditional view that the local-market industries are essentially competitive in character is probably correct, even though unconcentrated structure is not to be ascribed to them universally." Kaysen and Turner, *supra* at 40.

With a merger of the small proportions shown here, the decision called for by the statute should rest on realities, not abstractions. An empirical appraisal is necessary if an acquisition outside the ambit of the statute is not to be condemned. In the world of anti-trust little things can mean a lot.

This is not to say that an unlimited range of economic inquiry is required. But more than theoretical or superficial answers should be given to the questions—who may be injured by the merger, what injury will occur, where will it develop, and how significant will it be.

It is not an answer that Von's and Shopping Bag were among a dozen or more leading chains of super-markets in the Los Angeles area. And the pre-merger market share of 4.7 per cent for Von's and 4.2 per cent for Shopping Bag requires that a broad, rather than narrow, inquiry of its economic effects is needed.

The market in which Von's and Shopping Bag operate experienced a normal—nation-wide—structural evolution toward supermarkets generating fewer and larger stores. Nothing shown here provides a basis for raising a presumption of illegality which depends on disregarding acknowledged conditions fostering competition that are applicable in this case, e.g., the industry nationally and the market involved are not dominated by a few leaders, the merging companies are local operators and possessed a relatively small share of the market, remaining competition from both larger and smaller concerns is vigorous, and there is remarkably easy access to the market with new competition developing (Gov. Br. pp. 15-16, 27, 31, 40-42).

The Government's theory fails to concern itself with a realistic appraisal of the impact of the merger on

competition in the relevant market. Instead, it relies upon speculative hypotheses which it does not support on the basis of actual competitive conditions. In the trial of the case, the Government offered little of value showing the probable effects of the merger on market behavior, prices, cost of operation, ability of small firms to compete, entry of potential competition, strength of remaining competition, freedom to use advanced technologies, opportunities for innovation, significance of consumer preferences and other variables that are important.

Reliance on published market price surveys to infer oligopolistic tendencies is unrealistic. Such surveys are characteristic of fragmented highly competitive markets. It is when a market becomes oligopolistic, that price checking by such means becomes unnecessary because of general knowledge of the leaders' prices.

The Government assumes, entirely on the basis of a strict mechanical formula, that the merger is likely to lessen competition substantially. It seeks to impose a rule of general application in grocery retailing based on the size and relationship of the merging firms and changes in market shares.

Trouble arises because this concept is in direct conflict with reality. Such a narrow test—as the Government proposes—is based on a small body of facts isolated from their practical importance in the market.

This illustrates the hazards of reliance on a generalized formula for applying the sanctions of the law in this case. Mechanistic application of announced principles by syllogistic reasoning sometimes involves the process of inferring the desired result from an assumed premise. Facts tend to become subjugated to

the purpose of drawing a parallel, which is what the Goverment has done here. Judging the validity of its conclusion that the merger violates Section 7 requires independent evaluation of its premise.

By creating and then invoking a novel arbitrary test, the Government not only seeks to avoid the need to adduce convincing evidence showing that smaller firms will be at a decisive disadvantage because of the merger, but also disregards abundant evidence establishing the contrary. The vigorous and growing strength of remaining competition in the market—attested by numerous findings of fact by the trial court (Fdgs. 28-38, R. 3072-3076; Fdgs. 43-52, R. 3077-3080; Fdg. 82, R. 3088-3089), is considered unimportant under the Government's theory.

As this Court observed in *Times-Picayune:* "[N]o magic inheres in numbers; 'the relative effect of percentage command of a market varies with the setting in which the factor is placed.' "[16]

Since the application of Section 7 to a merger of retail grocery distributors raises questions of first impression before this Court, it is particularly important that careful attention be given to the validity of the Government's hypothesis that the merger of Von's and Shopping Bag should be decided on the basis of market share figures. It is a matter of no small importance that if this theory is correct, many horizontal mergers by retail operators having little or no adverse competitive impact (as well as those actually strengthening competition) will suddenly become suspect, if not automatically invalid.

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[16] *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 612 (1953).

II.

THE GOVERNMENT'S MAJOR RELIANCE ON THE MARKET POSITION AND COMPETITIVE RELATION OF VON'S AND SHOPPING BAG CONTRAVENES THE LEGISLATIVE PURPOSE, TERMS AND PROPER APPLICATION OF SECTION 7.

As established by this Court's analysis in the 1962 *Brown Shoe* opinion, Congress in amending Section 7 of the Clayton Act in 1950, broadened its focus particularly with respect to horizontal acquisitions:

> "Where the arrangement effects a horizontal merger between companies occupying the same product and geographic market, whatever competition previously may have existed in that market between the parties to the merger is eliminated. Section 7 of the Clayton Act, prior to its amendment, focused upon this aspect of horizontal combinations by proscribing acquisitions which might result in a lessening of competition between the acquiring and the acquired companies. The 1950 amendments made plain Congress' intent that the validity of such combinations was to be gauged on a broader scale: their effect on competition generally in an economically significant market." ***Brown Shoe, supra*** (370 U.S. at 335).

The Government's reasoning in this case rests on a premise that in a relatively decentralized market a combination of local supermarket firms holding a small share of the same market, faced with vigorous competition from firms of all sizes, should be presumed illegal under Section 7 largely because of the competitive relation and market position of the merging firms.

This is a strange rule to apply in retail grocery distribution which admittedly is not dominated by any company, and where small firms in many local markets

have demonstrated their viability resulting in relatively low concentration. But wholly aside from this issue, we submit that the Government's theory in this case is not warranted by the facts and not in accordance with the law.

A. One Legislative Purpose of Section 7, as Amended in 1950, Was To Broaden the Area of Inquiry and Focus Attention on the Probable Effects of the Merger on Competition Generally in the Relevant Market.

As originally enacted, Section 7 of the Clayton Act of 1914 provided three tests of violation: (1) substantial lessening of competition between the acquiring and the acquired corporations; (2) restraining commerce in any section or community; and (3) tending to create a monopoly. 38 Stat. 731. The 1950 amendments to Section 7, 64 Stat. 1125, 15 U.S.C. § 18, removed the first test and substantially altered the second, so the statute now provides two standards: (1) substantial lessening of competition in any section of the country; (2) tending to create a monopoly. Section 7 was of course designed to arrest its prohibited effects in their incipiency. *Brown Shoe, supra* (370 U.S. at 317).

By deleting the "acquiring-acquired" test and the term "community" in the original text, Congress plainly broadened the scale for determining where there is reasonable probability that a horizontal acquisition will have the prohibited effects of substantially lessening competition or tending to create a monopoly.

The legislative history of the 1950 amendments amply support this view. "It is expected that, in the administration of the act, full consideration will be given to all matters bearing upon the maintenance of com-

petition, including circumstances giving rise to the acquisition." S. Rep. No. 1775, 81st Cong., 2d Sess. 7 (1950).

Prominent proponents of the legislation urged this result. Senator Kefauver, one of the Act's sponsors, stated that the mere elimination of competition between the merged firms would not make the acquisition illegal. "[T]he merger would have to have the effect of lessening competition generally." 96 Cong. Rec. 16456 (1950). And at public hearings on earlier proposed legislation dealing with the subject, Congressman Clifford Case raised the objection that horizontal asset acquisitions would be illegal, if subject to the "acquiring-acquired" test, even though they invigorated competition. Hearings on HR 515, 80th Cong., 1st Sess. 23 (1947). During consideration of the legislation, repeated serious concern was raised about the danger of prohibiting horizontal mergers which afford greater competition to larger companies, and it was pointed out that the 1914 test based on competition between the acquiring and acquired companies was more restrictive than is now provided in the statute. HR Rep. No. 1191, 81st Cong., 1st Sess. 6-7 (1949). The legislative history of the 1950 amendments is particularly significant in this case, because of the attention given to benefits of competition which result from building up the competitive ability of small or local enterprise. See, e.g., 95 Cong. Rec. 11488 (1949); 96 Cong. Rec. 16435-16436 (1950).

Another change in Section 7, as enacted in 1950, which had the same general effect of broadening the injury standard, was deletion of the term "community". 96 Cong. Rec. 16456 (1950). Proposed

amendments as originally introduced retained the 1914 test in this respect, which would have been violated if competition was substantially lessened "in any community" of the country. Use of the word "community" raised a storm of protest, again for the reason that it could be used to prevent local businesses from improving their competitive position through horizontal mergers. S. Rep. No. 1775, 81st Cong., 2d Sess. 4 (1950). As this Court observed in *Brown Shoe, supra* (370 U.S. at 319), Congress sought to attack mergers having demonstrable anticompetitive effects recognizing that some mergers may stimulate competition. "The deletion of the word 'community' in the original Act's description of the relevant geographic market is another illustration of Congress' desire to indicate that its concern was with the adverse effects of a given merger on competition only in an economically significant 'section' of the country. Taken as a whole, the legislative history illuminates congressional concern with the protection of *competition,* not *competitors,* and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." *Brown Shoe, supra* (370 U.S. at 320).

It is clearly a factor of special importance in this case that in approving the 1950 amendments to Section 7, Congress was concerned with the excessive sweep of the earlier statute because of the injury test applicable to horizontal mergers. Attention was directed to the fact that this type of acquisition had special importance for local businesses desiring to build up their competitive strength.

The purpose of the 1950 amendments was to assure a broader construction of the more fundamental pro-

visions of the section that were retained. As one commentator stated:

> "The removal of the acquiring-acquired test and these clear statements of Congressional intent regarding the meaning of the phrase 'in any line of commerce in any section of the country' reveal clearly that one of the most important implications of the 1950 amendments of Section 7 is a complete change in the direction in which the commission and the courts must look for the effect of an acquisition. Under the new law, the investigation must center on a market, in the economic sense, rather than on the relationship between the acquiring and the acquired firms.'"[17]

Congress in amending Section 7 did more than close a loophole in the law. It also created "a new statutory formula for determining the legality of mergers".[18]

B. The Terms of Section 7, as Amended, Do Not Support the Government's Theory That the Instant Merger Is Illegal Because of the Size and Competitive Relationship of the Merging Firms.

One obvious difficulty with the Government's rationale in this case is the broad and general language of the statute. It speaks in terms of the effect of the acquisition "in any line of commerce in any section of the country". It deals with reasonably probable substantial lessening of competition, or tendency to create a monopoly. It does not approve or suggest any particular formula for analyzing the effects of a merger. *Brown Shoe, supra* (370 U.S. at 321).

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[17] Martin, Mergers And The Clayton Act 265 (1959).

[18] Bok, *supra* at 306.

If Congress intended otherwise and desired to impose some strict market shares rule of presumptive illegality, it had opportunity to do so. The fact is, however, that it rejected several proposals which would have taken a similar approach.[19]

Congress declined to make the difficult selection of a precise formula, the application of which would readily compartmentalize every case on the basis of a few simple facts. It left to the courts and the Federal Trade Commission the major responsibility for accommodating the interdependent concerns of preventing mergers which may substantially injure competition, while allowing legitimate and desirable mergers that have no such effect. "[M]any mergers are neutral with respect to competition, and some may promote efficiency or increase competition, or both."[20] And the mere possibility of a prohibited restraint or tendency to monopoly will not establish the statutory requirement. *United States* v. *E. I. DuPont de Nemours & Co.,* 353 U.S. 586, 598 (1957).

One of the dominant themes in this Court's *Brown Shoe* opinion is that the statute calls for an examination beyond market shares to determine its application in complex cases.[21] The proper test of illegality has been held to involve "the necessity for 'consideration not merely of the competition between the two com-

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[19] These bills are discussed in Martin, *supra* at 222-226.

[20] Markham, Merger Policy Under The New Section 7: A Six-Year Appraisal, 43 Va L Rev 489, 493 (1957).

[21] See, e.g., Barnes, The Primacy of Competition and the Brown Shoe Decision, 51 Geo. L J 706, 712-13 (1963); Rahl, Current Antitrust Developments In The Merger Field, 8 Antitrust Bull. 493, 508-09 (1963).

panies, but also the competitive situation of the industry.' " *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.,* 259 F. 2d 524, 527 (CA 2d Cir., 1958).

C. The Proper Application of Section 7 in This Case Does Not Rest on a Test Involving Competition between the Merging Firms, or Their Share of the Relevant Market.

In tracing the legislative history of the amendments to Section 7 adopted in 1950, this Court observed in *Brown Shoe* that Congress provided "no definite quantitative or qualitative tests by which enforcement agencies could gauge the effects of a given merger to determine whether it may 'substantially' lessen competition or tend toward monopoly". *Brown Shoe, supra* (370 U.S. at 321).

None of the indicia of an inherently suspect merger dealing with market power and concentration is present in this case, and in any event the record clearly establishes that the merger of Von's and Shopping Bag is not likely to have the anticompetitive effects prohibited by the statute. As has been shown in this argument, the facts with respect to the instant merger are in no sense similar, or even comparable, with those in *Philadelphia National Bank* (pp. 9-10, *supra*).

The merger of Von's and Shopping Bag should not be presumed illegal according to any so-called simplified standard. The burden is on the Government to prove that it will create a reasonable probability of a substantial lessening of competition, or a tendency to create a monopoly. This determination, if made, should rest on the merger's effects on competition generally in the relevant market.

A quantitative measure of competition between Von's and Shoping Bag, and of Von's market share following the acquisition does not provide the answer to the merger's impact on competitive conditions in the market. "For Section 7 cannot be satisfied by a mere showing that the merging companies do a large dollar volume of business." *U. S. Atty. Gen. Nat. Comm. to Study the Antitrust Law, Report 122.* Factors involving the size of the merging firms or the firm created by the merger cannot be judged without considering the setting within which the acquisition took place. The issue is whether the effect of the acquisition may be "substantially" to lessen competition. And Congress did not "adopt a definition of the word 'substantially,' whether in quantitative terms of sales or assets or market shares or in designated qualitative terms, by which a merger's effects on competition were to be measured." *Brown Shoe, supra* (370 U.S. at 321).

The general language of the statutory standard applicable "reflects a conscious avoidance of exclusively mathematical tests". *Brown Shoe, supra* (370 U.S. n. 36 at 321). Manifestly, the Government's attempt to measure the effects of the instant merger in terms of a rigid static mold which gives no consideration to variables in the market setting is untenable.

The merger involved here, like all horizontal acquisitions, necessarily resulted in bringing together the sales volume of the merging firms. An increase in the market share of the resulting firm almost certainly develops as a natural outgrowth. But not all horizontal mergers are outlawed; only those which have a probability of substantially lessening competition

or tending to create a monopoly are prohibited. The law was not intended to prohibit all acquisitions among competitors. HR Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949).

The competitive impact of the instant merger cannot be ascertained simply by measuring the volume of business done by Von's and Shopping Bag before the merger, or computing the increase in market share held by Von's after the merger.

III.

THE GOVERNMENT'S MECHANICAL TEST HOLDING HORIZONTAL GROCERY MERGERS PRESUMPTIVELY UNLAWFUL DEFEATS ANTITRUST POLICY

A matter of considerable concern is what general effect the Government's theory for outlawing the challenged merger will have on economic concentration in the industry. We submit it will frustrate the purpose of Section 7 by fostering creation of oligopolistic conditions which foreclose local operators from markets otherwise open to them. If allowed to prevail, the Government's policy will tend to change retail grocery distribution from one that is relatively unconcentrated, decentralized and intensely competitive, to one in which large concerns can capture an increasing number of high volume supermarkets.

Horizontal mergers are not the only road which can lead to undesirable economic concentration. There are alternative routes, and anti-merger policy should not be designed or applied in a manner that will have the effect of encouraging undue concentration by other means.

As pointed out previously, the design of the Government in this action is to outlaw horizontal mergers in

grocery distribution by means of the most unyielding mechanistic formula. This type of merger is frequently the only kind of acquisition open to a vast majority of retail operators desiring to expand and thereby strengthen their competitive position.

If shares of the relevant market—held by the acquiring and acquired firms, by the new firm, and by remaining competitors—are to raise an automatic presumption of a violation without making an economic appraisal of the merger's likely impact on competition in the market, many retailers will be deprived of an effective means for growth beneficial to competition. Oligopoly, with its attendant adverse effects upon local control which Congress sought to prevent, will be furthered by the Government's standard for judging the merger here involved.

A. The Standard of Presumptive Illegality Based on Changes in Market Structure Provides a Basis for Prohibiting Beneficial Horizontal Mergers Involving Relatively Small Firms.

A merger of two local, largely family-owned concerns, each having approximately 4 per cent of a large metropolitan market which is highly competitive and decentralized, is automatically condemned under the Government's theory in this case. The dangers to which the basis for this judgment leads in invalidating horizontal mergers of smaller supermarket operators are readily apparent.

It is evident that the Government is seeking to provide a general guideline for judging horizontal retail mergers in the industry (J.S. p. 11). The first element of its test of presumptive illegality, namely a market "threatened" with increasing concentration

(Gov. Br. p. 25), can be met by showing a structural change in the relevant market toward fewer and larger outlets. This is characteristic of almost every local market area, since, as the Government points out, the number of grocery stores has declined in recent years, with the growth of the supermarket method of food retailing (Gov. Br. p. 15). Consequently the average sales size, and hence market share, of those stores remaining have increased. Thus, under this standard, the Government could establish at least half its case against a vast range of horizontal mergers where no conceivable injury to competition could result.

Simplified to its essential meaning, the second and final element of the proposed standard requires demonstrating that "the merger thus reduces the number of significant competitors in the market and enhances the market position of those that remain" (Gov. Br. p. 26). Here again a simple structural change is the key. Such a change in market structure is inherent in any horizontal merger, except one of de minimis proportions where the acquired firm may be considered an unimportant competitive factor. What the Government is really seeking is wide discretionary authority for condemning virtually any significant horizontal merger involving grocery stores without bothering to weigh its actual and potential impact on the strength of competition in the market affected.

But aside from this sweeping aspect of the Government's theory, other considerations bring it into conflict with "Congress' desire to promote competition through the protection of viable, small, locally owned businesses." *Brown Shoe, supra* (370 U.S. at 344). Commercial realities warrant the inference that there may

be local markets with greater structural concentration than exists in Los Angeles. And it would not be surprising to find this condition particularly in markets and submarkets of considerably smaller population and area size, where independent and local operators have been able to prosper by aggressive competition.[22]

If the acquisition of a local distributor the size of Shopping Bag, holding only 4.2 per cent of the sales of such a vast, highly decentralized and competitive market as Los Angeles, can produce prohibited structural changes under the Government's test, it could easily apply with the same harsh result against benign and even beneficial mergers by smaller operators in smaller markets and submarkets.

In retail distribution, convenience of location has the effect of localizing competition. And, as this Court observed in ***Philadelphia National Bank, supra*** (374 U.S. at 357), the appropriate geographic market may be determined, not with relation to "where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate."

The selection of the relevant geographic market, or submarket, governs the extent to which changes in market share, market rank, market gap and concentration ratios are measured and observed. The size of the market in terms of area, population and sales can have a pronounced effect in determining the thrust of a horizontal merger, most especially in terms of structural changes. In ***Tampa Electric Co.*** v. ***Nashville***

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[22] See Kaysen and Turner, *supra* at 40. And consult note 15, *supra*.

Coal Co., 365 U.S. 320 (1961), this Court recognized that as the pie is sliced more thinly, measuring the prospect of injury by means of a purely quantitative test necessarily results in a greater comparative effect.

These considerations prompt the view that if the Government's standard for judging horizontal mergers is upheld, it will have achieved an unsurpassed latitude for condemning acquisitions in grocery distribution, including those which clearly invigorate competition. If the merger of Von's and Shopping Bag, achieving 7 per cent of sales in the relevant market is held illegal, it could well require disapproval of future merger efforts by smaller retailers resulting in similar market shares.

B. The Government's Standard for Proscribing Horizontal Mergers Will Penalize Many Relatively Small Operators.

The rule of presumptive unlawfulness, based entirely on structural changes in the market, will require many relatively small retailers to rely on competitive internal growth as the only safe and dependable means of expansion, in keeping pace with the market they serve. As we have pointed out, expansion through the merger route will become dangerous for a large number of retail operators under the arbitrary strictures sought to be applied here. And since a majority of retailers lack sufficient resources for prolonged litigation, even the prospect of an attack would dissuade them from going ahead. In practical effect, many small and medium size enterprises would suffer the considerable disadvantage of being forced to build rather than buy added facilities.

It is not a sophism to suggest that the backlash effect of the Government's theory in this case would

create inequalities leading to substantial competitive problems for numerous independent retailers. Some of these effects would be indirect, but nevertheless real.

Bok summarized many of the factors involved as follows:

> "The advantages of buying over building are, however, numerous. For one thing, new facilities can be purchased more quickly than they can be built. In the second place, since the securities of the acquired firm are frequently selling below the replacement cost of its assets, it is often cheaper to buy. Third, the purchase of another firm may bring specialized know-how or managerial ability (though in reality this argument is but a variant of its predecessor since talent of this sort could presumably be 'bought' at some price). Fourth, buying an existing firm provides a certain security, in that it may assure the acquiring firm of products that have already proved themselves in the market. Finally, an acquisition can sometimes be financed more easily than new construction, since stockholders of the acquired firm may be more willing to accept shares of the acquiring company than investors would be to take such shares at a public distribution. *Thus, the expenses and risks connected with building are no mere trifles. In some cases, they may loom large enough to cause a firm to abandon expansion plans if merging is blocked;* this is particularly likely where the anticipated benefits from expansion are not great. On the other hand, it is also true that the largest firm in the market will usually be as able as any to surmount these difficulties and to expand by internal growth if expansion promises in fact to be profitable."[23] (Emphasis added)

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[23] Bok, *supra* at 302-303.

Underlying all these disadvantages is the fact that smaller concerns lack the leverage of money, and are less able to secure adequate growth capital in competition with larger rivals. And the Government acknowledges that the capital requirements for opening a new supermarket are a significant competitive factor (Gov. Br. pp. 40-41).

To whatever extent this is manifested in blocking the development of such enterprises, or making the process more costly and slower, the issue becomes not one of being forced to build, but being denied adequate opportunity to expand in competition with more opulent rivals. The question here is not one of private interests, but rather the public interest in preventing malignant competitive effects. From this point of view, the Government's proposed standard is so expansive and so rigid as to create a substantial risk that it will make the statute self-defeating. In sum, the Government's simplified test does violence to the Congressional objective embodied in Section 7.

CONCLUSION

For all of the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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